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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SEVEN

PACIFIC SUN DISTRIBUTING et al., Plaintiffs, Cross-defendants and Appellants, v. JESSE MARTIN, Defendant, Cross-complainant and Appellant.	B221716 (Los Angeles County Super. Ct. No. VC051277)

APPEALS from a judgment of the Superior Court of Los Angeles County, Robert L. Higa, Judge. Affirmed.

Grant, Genovese & Baratta, David C. Grant and Ronald V. Larson for Plaintiffs, Cross-defendants and Appellants Pacific Sun Distributing and Ray Davis.

William L. Zeltonoga for Defendant, Cross-complainant and Appellant.

Pacific Sun Distributing (Pac Sun), a produce distribution company, and Ray Davis, its president and majority shareholder, sued Jesse Martin, the lone minority shareholder, for a declaration of the value of Martin's equity interest in Pac Sun and an order directing Martin to sell his shares to Davis or the corporation. In the alternative, Davis requested involuntary dissolution of the corporation under Corporations Code section 1800. Martin filed a cross-complaint seeking damages on a number of tort theories, including fraud and breach of fiduciary duty, alleging Davis had paid himself an unreasonable salary and had used corporate funds for personal expenses. After a bench trial the court adopted the price for Martin's shares proposed by Davis's business valuation expert and found Davis had paid himself a reasonable salary. The court declined, however, to issue injunctive relief requiring Martin to sell his shares or dissolving the company. Both sides have appealed. We affirm.

FACTUAL AND PROCEDURAL BACKGROUND

1. *The Formation of Pac Sun*

In 1999 Davis, an experienced produce salesman, decided he wanted to go into business for himself. He approached Martin, a well-known produce distributor who already owned several companies, about investing in a distribution company Davis would run. The two men agreed each would contribute $50,000 to the new venture. Davis would hold 70 percent of the shares of the new company, and Martin would hold 30 percent.[1] According to their oral agreement, Davis would run the company on a day-to-day basis, and Martin would contribute space at his existing cold storage facility and consult with Davis as needed. Davis and Martin also agreed Davis would pay himself a reasonable salary, and the two men would split the profits according to their respective ownership interests.

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[1] Davis also invited Ken Sato, a produce buyer, to invest $50,000 in the company in return for a 30 percent stock interest, leaving Davis with 40 percent ownership. Sato, however, did not complete the transaction. Accordingly, Davis remained a 70 percent shareholder.

Martin testified that he always conducted business on a handshake basis and trusted Davis to act fairly. Nonetheless, Martin asked his own attorney to draft the corporate documents, including a voting agreement, which were signed by Davis without consulting an attorney.

The bylaws of Pac Sun, a close corporation, authorize the election of only two directors. The voting agreement, in turn, states it is intended to ensure Davis and Martin have "an equal voice on the board of directors not to be affected by their different shareholding" and restricts significant corporate transactions unless both Davis and Martin agree. In particular, the agreement requires Davis and Martin to "vote all of their shares for the election of Davis and Martin as the only directors of the Corporation unless otherwise unanimously agreed to by them in writing" and further requires Davis and Martin, unless otherwise unanimously agreed in writing, to vote all their shares "against the granting of shares to any person or entity," "against the sale of substantially all assets of the Corporation," "against any merger or reorganization of the Corporation" and "against any voluntary dissolution of the Corporation." To enforce these restrictions, Davis and Martin granted each other an irrevocable proxy to vote the other's shares in the event of a violation of the voting agreement.

2. *Pac Sun's Performance*

Over the course of the next seven years Davis, as president, operated Pac Sun out of Martin's warehouse. The company's annual income steadily increased. Martin held the titles of chief financial officer and secretary but, other than casual conversations with Davis, took no active role in Pac Sun's operations. Davis hired an accountant to prepare the company's financial statements and tax returns. Based on the accountant's assessment of a reasonable salary for his efforts, Davis drew a salary that grew with the performance of the company.[2] Although Davis stated Martin was always welcome to

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[2] Davis's salary averaged $207,348 over the course of 10 years. His salary peaked in 2008, when he drew a salary of $428,076. Pac Sun's income that year was elevated because Davis secured an international grocery client in 2007. Pac Sun lost the account in 2009, leading to reduced income for Pac Sun and a greatly reduced salary for Davis.

view Pac Sun's financial information, he never disclosed his salary to Martin. He also never told Martin Pac Sun had employed his wife and paid for her car with company funds.

According to Martin, he assumed most of Pac Sun's income was being reinvested in the company. In 2005, when Davis advised him Davis's elderly parents were in need of assistance, Martin authorized Davis to assist them with company funds. Through 2006 Martin was paid a total of $168,320 in year-end profits.[3]

3. *The Rift Between Davis and Martin*

In September 2006 Martin told Davis he was considering retirement and wanted Davis to purchase his 30 percent share of Pac Sun. Davis consulted with his accountant and proposed a buy-out figure of $168,000, which Martin believed to be too low. In October 2006 Martin sent a letter demanding Pac Sun pay rent for its use of his warehouse space. Martin also demanded retroactive rent from 2000 to 2006. Davis rejected the demands as outside the terms of their agreement and discontinued payment of profits to Martin. In April 2007, as tensions mounted, Davis moved Pac Sun's operations to a new warehouse facility without consulting Martin.

Over the next year, the parties were unable to agree on a buyout price. In September 2007 Martin obtained Pac Sun corporate documents and learned—for the first time, he claimed—of Davis's salaries and bonuses. On July 3, 2008 Davis and Pac Sun filed a complaint and on July 10, 2008 a first amended verified complaint seeking a judicial determination of the fair market value of Martin's shares and injunctive relief ordering Martin to sell his shares to Davis, if Davis so desired, or dissolving the corporation under Corporations Code section 1800. Following an unsuccessful demurrer, Martin filed a verified answer, in which he admitted he wanted to sell his shares in Pac Sun "at an acceptable price." In his prayer for relief Martin stated, "Should the court determine a price for defendant's shares of stock, that it be decreed that plaintiffs, jointly and severally shall buy defendant[']s shares of stock and pay him such price forthwith at

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[3] Davis conceded he owed Martin an additional $29,000 in profits and paid him during trial.

the price so set with no contingency, on any grounds." Martin also filed a cross-complaint alleging six causes of action for fraud, breach of fiduciary duty, breach of contract, breach of the covenant of good faith and fair dealing, unfair business practices (Bus. & Prof. Code, § 17200) and a common count for monies owed.

4. *Trial*

In June 2009 Davis and Pac Sun moved to vacate the order setting the case for a jury trial and to reset it for a bench trial, arguing the amended complaint sought only equitable relief and the "gist" of the cross-complaint was also equitable. The court granted the motion over Martin's opposition. Trial began on September 29, 2009. Following four days of testimony, the court issued its ruling from the bench finding the value of Martin's interest to be $210,000, rent was not part of the original agreement, Davis's salary was reasonable and he had acted in good faith. The court found in Davis and Pac Sun's favor on the cross-claims and directed Davis to prepare a statement of decision.

After Davis filed a proposed statement of decision, Martin filed an opposing version requesting four additional findings of fact targeting the proposed injunctive relief; according to Martin, Davis and Pac Sun had failed to prove an enforceable contract for Martin to sell his shares, a duty to sell the shares, any conduct on his part justifying an order to sell his shares or any entitlement to injunctive relief. On November 12, 2009 the trial court entered its judgment and statement of decision, adopting Martin's proposed factual findings and denying injunctive relief. The court valued Martin's shares at $210,000 and found Martin had been paid all profits due to him.

Davis moved to vacate the judgment under Code of Civil Procedure section 663, contending the judgment was inconsistent with admissions contained in Martin's verified answer. At a hearing on January 4, 2010 the court denied the motion noting it had not considered alleged admissions in the answer because they had not been brought to the court's attention during trial. Both parties have appealed.

CONTENTIONS

Martin contends the trial court violated his right to a jury trial of his legal claims against Davis and Pac Sun and abused its discretion in admitting into evidence protected settlement communications. We construe a third argument as a contention the trial court's findings relating to Martin's profits and the valuation of his shares were not supported by substantial evidence.

Davis and Pac Sun contend the court improperly denied injunctive relief directing Martin to sell his shares to Davis or, in the alternative, dissolving the corporation.

DISCUSSION

1. *The Trial Court Did Not Err in Resolving the Cross-complaint Without a Jury*

When a case presents a combination of equitable and legal claims, the equitable claims may properly be tried first to the court; "if the court's determination of those issues is also dispositive of the legal issues, nothing further remains to be tried by a jury." (*Raedeke v. Gibraltar Sav. & Loan Assn.* (1974) 10 Cal.3d 665, 671; accord, *Nwosu v. Uba* (2004) 122 Cal.App.4th 1229, 1238.) That is, the court's findings on an equitable claim may obviate the need for a subsequent trial on the legal claims. (*Nwosu*, at p. 1238.) Resolving a litigant's legal claims on this basis does not violate the right to trial by jury. (*Id.* at pp. 1243-1244.)

Ordinarily, a minority shareholder's action for damages alleging a breach of fiduciary duties by the majority shareholder is one in equity, with no right to a jury trial. (*Nelson v. Anderson* (1999) 72 Cal.App.4th 111, 122, citing *Interactive Multimedia Artists, Inc. v. Superior Court* (1998) 62 Cal.App.4th 1546, 1555-1556.) On appeal Martin concedes the complaint raised only equitable claims and does not challenge the principle that his claim for breach of fiduciary duty was foreclosed by the trial court's equitable rulings. However, he contends his causes of action for fraud and breach of contract arise not from his position as a minority shareholder, but from his 1999 oral agreement with Davis to engage in business together.

Whatever the source of Martin's claims, the trial court properly ruled they were necessarily determined by its findings on Davis's and Pac Sun's equitable claims.

Specifically, the court found the initial agreement between Davis and Martin did not contemplate the payment of rent by Pac Sun and provided Davis was entitled to draw a reasonable salary from the corporation. The court concluded the salary and benefits Davis received, which varied widely with the financial performance of Pac Sun, were reasonable, thereby vitiating Martin's claims for fraud and breach of contract. (See *Nwosu v. Uba, supra,* 122 Cal.App.4th at p. 1239; *Peterson v. Peterson* (1946) 74 Cal.App.2d 312, 321-322.) There was no error.

2. *The Trial Court Did Not Abuse its Discretion in Admitting Martin's Letters Containing Valuations of his Stock Interest*

Evidence Code section 1152, subdivision (a), provides, "Evidence that a person has, in compromise . . . furnished or offered or promised to furnish money or any other thing . . . to another who has sustained . . . loss or damage, as well as any conduct or statements made in negotiation thereof, is inadmissible to prove his or her liability for the loss or damage or any part of it." Evidence Code section 1154 provides, "Evidence that a person has . . . offered . . . to accept a sum of money or any other thing . . . in satisfaction of a claim, as well as any conduct or statements made in negotiation thereof, is inadmissible to prove the invalidity of the claim or any part of it." As we explained in *Zhou v. Unisource Worldwide, Inc.* (2007) 157 Cal.App.4th 1471, 1475 (*Zhou*), "[b]oth provisions are based on the public policy in favor of the settlement of disputes without litigation and are intended to promote candor in settlement negotiations: 'The rule prevents parties from being deterred from making offers of settlement and facilitates the type of candid discussion that may lead to settlement.'" (Accord, *Caira v. Offner* (2005) 126 Cal.App.4th 12, 32.)

The trial court granted Martin's motion in limine to exclude evidence of settlement negotiations, but cautioned it would reconsider communications between the parties at the time the evidence was proffered. When Davis introduced the letter from Pac Sun's accountant valuing Martin's shares at $168,000, Martin objected the letter was a settlement communication subject to the in limine order. The court overruled the objection. Davis next introduced a follow-up letter from the accountant acknowledging

Martin's belief the valuation was too low. Again, the court overruled Martin's objection the letter constituted a protected settlement communication.[4]

The trial court did not err in admitting the accountant's letters.[5] The first letter was not part of any settlement negotiations. At Martin's request, the accountant prepared a valuation of Martin's shares to enable Davis to buy out Martin's interest in Pac Sun. The accountant, not Davis, transmitted the valuation directly to Martin. At the time the information was provided to Martin, the parties were not in conflict; and the accountant was simply responding to a mutual request for information. (Cf. *Caira v. Offner, supra,* 126 Cal.App.4th at p. 34 [email proposing repurchase of stock was part of lengthy dispute among sibling shareholders and was intended to "rekindle faltering settlement negotiations"].) As we acknowledged in *Zhou*, "a letter itemizing what the sender thinks the recipient owes him or her and demanding payment, even under threat of legal action, is, in effect, a bill and not an offer in settlement or a document in settlement negotiations excludable under sections 1152 and 1154." (*Zhou, supra,* 157 Cal.App.4th at p. 1477, citing *Volkswagen of America, Inc. v. Superior Court* (2006) 139 Cal.App.4th 1481, 1494 ["[i]f the statement was not intended as a concession but as an assertion of ""all that he deemed himself entitled to,"" it is not an offer of compromise"].)[6] In addition, the letter

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[4] Martin did not object to the introduction of subsequent letters he wrote to Davis and the accountant, which placed a higher value on the shares.

[5] A trial court's ruling on the admissibility of evidence is generally reviewed for abuse of discretion. (*Zhou, supra,* 157 Cal.App.4th at p. 1476.)

[6] Our decision in *Zhou* is not to the contrary. In *Zhou, supra,* 157 Cal.App.4th 1471, we concluded Zhou's initial letter to State Farm inviting "'a separate quick and confidential[] settlement . . . without lawyer's involvements'" and seeking "'reasonable compensations to cover for my physical pain and economic loss'" was a protected settlement communication because it invited State Farm to make an offer to settle Zhou's claim against one of State Farm's insureds. The accountant's letter here, responding to a bilateral request to value Martin's 30 percent shareholding, is more like a bill or pre-dispute statement of value that is not offered to compromise a legal claim. (See *Volkswagen of America, Inc. v. Superior Court, supra,* 139 Cal.App.4th at p. 1494 ["[a] statement by a claimant concerning the extent of his injuries or disease, or concerning the amount of damages he or she claims to have suffered, *if 'not connected with an offer of compromise*,' may well constitute an admissible admission" (italics added)].)

was not offered to prove either liability or the invalidity of Martin's own valuation of the shares; it was offered to establish the existence of a disagreement between Davis and Martin that entitled the plaintiffs to declaratory relief.

The second letter acknowledges the existence of a conflict—"you expressed to both Ray and I that you felt the value was too low"—but contains nothing more than an invitation to Martin to work toward a solution. Again, this letter was not offered to prove anyone's liability or the value of Martin's shares. Even assuming this innocuous statement by the accountant should properly be considered an invitation to compromise, and thus subject to Evidence Code section 1152, its admission constituted harmless error. It was no surprise to anyone that Martin considered the accountant's valuation of his shares to be too low. (See Evid. Code, § 353 ["[a] verdict or finding shall not be set aside, nor shall the judgment or decision based thereon be reversed, by reason of the erroneous admission of evidence unless: (b) . . . the error or errors complained of resulted in a miscarriage of justice"]; *Zhou, supra*, 157 Cal.App.4th at pp. 1480-1481.)

3. *Substantial Evidence Supports the Trial Court's Valuation of Martin's Entitlement to Profits and Equity Interest in the Company*

Martin contends the court erred in finding Martin's profit share had been fully paid by Davis and Pac Sun in the amount of $197,320 and adopting Davis's expert's valuation of Martin's shares.

We review the trial court's factual findings for substantial evidence (*Kuhn v. Department of General Services* (1994) 22 Cal.App.4th 1627, 1633), viewing the record in the light most favorable to respondents and resolving all inferences in support of the judgment. (*Milton v. Perceptual Development Corp*. (1997) 53 Cal.App.4th 861, 867.) "When two or more inferences can reasonably be deduced from the facts, a reviewing court is without power to substitute its deductions for those of the trial court." (*Green Trees Enterprises, Inc. v. Palm Springs Alpine Estates, Inc.* (1967) 66 Cal.2d 782, 784-785; accord, *Estate of Leslie* (1984) 37 Cal.3d 186, 201.) Moreover, we are precluded from reevaluating the trial court's credibility determinations. (See *Sav-On Drug Stores, Inc. v. Superior Court* (2004) 34 Cal.4th 319, 334 ["'questions as to the weight and

sufficiency of the evidence, the construction to be put upon it, the inferences to be drawn therefrom, the credibility of witnesses . . . and the determination of [any] conflicts and inconsistencies in their testimony are matters for the trial court to resolve'"]; *Beck Development Co. v. Southern Pacific Transportation Co.* (1996) 44 Cal.App.4th 1160, 1204 ["testimony of a witness offered in support of a judgment may not be rejected on appeal unless it is physically impossible or inherently improbable and such inherent improbability plainly appears"].) When the record as a whole shows a reasonable trier of fact could have found in favor of respondents, we must affirm. (*Kuhn,* at p. 1633.)

Regarding the sums he has been paid, Martin challenges the failure of the Pac Sun accountant to quantify the benefit he provided to the company. Such a calculation, however, was unnecessary. Martin's share of profits as a 30 percent owner of the company was properly based on Pac Sun's annual net income—total revenue less all costs—not on any uncompensated value Martin may have contributed to the company. Although Martin attacked Davis's salary as excessive, the court expressly found it was reasonable; and, therefore, it was properly excluded from any determination of profits. In short, Martin did not succeed in impeaching the amount of profits he had already received.

Regarding the valuation of his 30 percent share of Pac Sun, Martin contends Davis's expert, whose figure of $210,000 the court adopted, improperly manipulated tax calculations in order to minimize his valuation of Martin's share. The trial court, however, heard extensive testimony relating to the company's reported taxable income and still concluded Davis's expert's valuation was the most convincing. As the court pointed out, the competing valuations by the parties' experts were remarkably consistent in result, if not methodology, with the difference lying in Martin's expert's failure to consider the loss of Pac Sun's largest client and its impact on the profit stream of the company. Based on that omission, the court selected the valuation provided by Davis's expert. The court's valuation finding was supported by substantial evidence, and we are without power to replace it with a different calculation.

4. *The Trial Court Did Not Abuse Its Discretion in Declining To Order the Sale of Martin's Shares or, in the Alternative, Dissolution of Pac Sun*

Corporations Code section 1800 gives the superior court jurisdiction over an action for the involuntary dissolution of a corporation. Corporations Code section 1804 authorizes a court to "decree a winding up and dissolution of the corporation if cause therefor is shown or, with or without winding up and dissolution, may make such orders and decrees and issue such injunctions in the case as justice and equity require." Davis and Pac Sun, in their cross-appeal, contend the trial court erred in refusing to order Martin to sell his shares to Davis or, in the alternative, to dissolve the company.

A grant or denial of injunctive relief is generally reviewed for abuse of discretion. (*Salazar v. Eastin* (1995) 9 Cal.4th 836, 849-850.) "The appropriate test for abuse of discretion is whether the trial court exceeded the bounds of reason. When two or more inferences can reasonably be deduced from the facts, the reviewing court has no authority to substitute its decision for that of the trial court." (*Shamblin v. Brattain* (1988) 44 Cal.3d 474, 478-479.)

Davis and Pac Sun failed to establish grounds for the trial court to grant the requested relief over Martin's objection. As specified in their first amended complaint, Davis and Pac Sun first sought an order directing Martin to sell to either Davis or Pac Sun his shares at the price established by the court. Having obtained the court's ruling on price, Davis and Pac Sun contend the trial court failed to give them an adequate remedy; in essence, they obtained a costly ruling with no concurrent benefit to them. Pointing to Martin's verified answer, in which he prayed for an order to sell "with no contingency," they argue both parties sought this relief and that Martin is bound by his previous request, either by dint of the admission in his verified answer or by judicial estoppel.[7] (See, e.g.,

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[7] The doctrine of judicial estoppel does not apply here. It is limited to circumstances in which "'(1) the same party has taken two positions; (2) the positions were taken in judicial or quasi-judicial administrative proceedings; (3) the party was successful in asserting the first position (i.e., the tribunal adopted the position or accepted it as true); (4) the two positions are totally inconsistent; and (5) the first position was not taken as a result of ignorance, fraud, or mistake.'" (*Aguilar v. Lerner* (2004) 32 Cal.4th

Valerio v. Andrew Youngquist Const. (2002) 103 Cal.App.4th 1264, 1271 ["'An admission in the pleadings is not treated procedurally as evidence; i.e., the pleading need not (and should not) be offered in evidence, but may be commented on in argument and relied on as part of the case. And it is fundamentally different from evidence: It is a waiver of proof of a fact by conceding its truth, and it has the effect of removing the matter from the issues.'")

Martin's verified answer, however, contains no binding or conclusive admission that sale of his shares should be ordered by the court. The most Martin admits is his desire to sell his shares "at an acceptable price." Although he included in his prayer for relief a request the court order sale of his shares at the price established by the court "with no contingency," a statement in a prayer for relief does not constitute an evidentiary admission. (See *CytoDyn of New Mexico, Inc. v. Amerimmune Pharmaceuticals, Inc.* (2008) 160 Cal.App.4th 288, 299 [rejecting claim that a prayer for damages constituted a judicial admission]; *Castillo v. Barerra* (2007) 146 Cal.App.4th 1317, 1324 ["a mere conclusion, or a 'mixed factual-legal conclusion' in a complaint, is not considered a binding judicial admission"]; *Anderson v. Metalclad Insulation Corp.* (1999) 72 Cal.App.4th 284, 295 [prayer for relief is not equivalent to an allegation of fact and does not constitute an evidentiary admission].)

As to dissolution under Corporations Code section 1800, Davis and Pac Sun presented insufficient evidence to justify this equitable remedy. Only two of the five grounds identified in Corporations Code section 1800, subdivision (b), are even arguably relevant: Subdivision (b)(2), which requires evidence the business can no longer be conducted to advantage or there is danger of impairment of loss of the corporation's property or business due to a deadlock on the board of directors;[8] and subdivision (b)(5),

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974, 986-987; accord, *CytoDyn of New Mexico, Inc. v. Amerimmune Pharmaceuticals, Inc.* (2008) 160 Cal.App.4th 288, 299.)

[8] Corporations Code section 1800, subdivision (b)(2), allows a court to order involuntary dissolution when "[t]he corporation has an even number of directors who are equally divided and cannot agree as to the management of its affairs, so that its business

which requires evidence that liquidation is necessary to protect the rights or interests of the complaining shareholder.[9] Although several witnesses testified relations between Davis and Martin were tense and difficult, there was no evidence Davis's ability to operate the corporation had been impaired by the men's inability to agree to an appropriate buy-out of Martin's interest. Davis made all operational decisions and had moved Pac Sun from Martin's warehouse without consulting Martin. Indeed, in addressing the appropriate relief after trial, Martin's counsel represented to the court that Martin did not want to sell his shares and wanted to remain, in effect, a silent shareholder.

Ordinarily, a majority shareholder in Davis's position would have the right under Corporations Code section 1900, subdivision (a), to *voluntarily* dissolve a corporation over the objection of a minority shareholder. That is the right Davis expressly contracted away in the voting agreement. By executing that agreement, Davis was left with only the remedy under Corporations Code section 1800 for involuntary dissolution. Davis has been unable to identify any factual basis for this court to reverse the decision by the trial court, which, under the circumstances, was not an abuse of its discretion.

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can no longer be conducted to advantage or so that there is danger that its property and business will be impaired or lost, and the holders of the voting shares of the corporation are so divided into factions that they cannot elect a board consisting of an uneven number."

[9] Corporations Code section 1800, subdivision (b)(5), allows a court to order involuntary dissolution when, "[i]n the case of any corporation with 35 or fewer shareholders (determined as provided in Section 605), liquidation is reasonably necessary for the protection of the rights or interests of the complaining shareholder or shareholders."

DISPOSITION

The judgment is affirmed. The parties are to bear their own costs on appeal.

PERLUSS, P. J.

We concur:

ZELON, J.

JACKSON, J.